STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MUTUAL ORGANIZATION OF SUPERVISORS, Charging Party, v. FAIRFIELD-SUISUN UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-2806-E PERB Decision No. 2262 May 8, 2012

Appearances: Rick Lemke, Job Steward, for Mutual Organization of Supervisors; Littler Mendelson by Bruce Sarchet, Attorney, for Fairfield-Suisun Unified School District.

Before Martinez, Chair; Dowdin Cavillo and Huguenin, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Mutual Organization of Supervisors (MOS) to the proposed decision of a PERB Hearing Officer (Hearing Officer). The Hearing Officer concluded that the Fairfield-Suisun Unified School District (District) did not violate section 3543.5(c) of the Educational Employment Relations Act (EERA).[1]

The complaint alleged that without affording MOS notice or an opportunity to negotiate, the District changed its discipline policy as set forth in the parties' collective bargaining agreement, when it terminated a MOS unit employee without following the progressive discipline steps and relied instead on a "zero tolerance" policy with respect to the

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

employee's alleged refusal to submit to a random controlled substance and/or alcohol test, and cited the employee's alleged failure to model appropriate behavior with respect to such testing requirements. The Hearing Officer concluded that the termination in question complied with contractual procedure, and dismissed the complaint.

In its exceptions, MOS urges that the District terminated the employee in violation of the contractual progressive discipline procedure. The District filed no exceptions, but opposes those of MOS.[2]

We have reviewed the proposed decision and the hearing record in light of MOS's exceptions, the District's response thereto, and the relevant law. As set forth below, we reverse the proposed decision.

PROCEDURAL HISTORY

On October 19, 2009, MOS filed its unfair practice charge.

On November 12, 2009, the Office of the General Counsel issued a complaint in this matter.

On August 24, 2010, a formal hearing was held.

On January 25, 2011, the Hearing Officer issued the proposed decision.

On February 15, 2011, MOS filed its exceptions.

On March 8, 2011, the District responded.

[2] In its response to the MOS exceptions, the District asserts that several claims made by MOS in its exceptions are unsupported by the record. We have reviewed the record, and considered the contentions of both parties. Our findings stated below reflect only the record evidence.

FINDINGS OF FACT

Jurisdiction

The District is a public school employer within the meaning of EERA section 3540.1(k). MOS is the exclusive representative of an appropriate bargaining unit of employees within the meaning of EERA section 3540.1(e).

Bargaining Unit

The MOS-represented bargaining unit includes 12 supervisory positions. Two of the positions are in the District's transportation department (transportation supervisors), including the position of "Transportation Operation Supervisor."

Progressive Discipline

Prior to 1996, the parties' negotiated contract (contract) contained an article establishing a progressive discipline procedure (Article 11). Although the parties have negotiated several contracts since 1996, they have not changed the progressive discipline language. Article 11 states, in pertinent part:

> Progressive steps shall be utilized in handling discipline and the discipline shall be commensurate with the offense. The following actions will be taken in order:
>
> Verbal reprimand
> Written reprimand
> Discipline less than dismissal
> Dismissal
>
> If the conduct of [the unit member] endangers the safety of students, employees, or District property, the Superintendent or his/her designee will not be required to follow the progressive steps of discipline and may suspend the supervisor with pay pending the outcome of the process prescribed herein.
>
> The Superintendent or designee for reasons stated in writing and sent to [MOS] may skip one or more steps in the above sequence in cases of emergency.

Article 11 requires the District to use progressive discipline, with two exceptions. The District may skip the progressive steps of discipline when the employee's "conduct" endangers "the safety of students, employees or District property." It may also skip the progressive steps of discipline "in cases of emergency," provided it affords MOS written notice of the reasons therefor.

Federal Drug Testing Requirement

The District employs approximately 45 school bus drivers. Each driver must possess a commercial driver's license and a "school bus driver certificate" issued by the Department of Motor Vehicles (DMV). The transportation supervisors occasionally fill in for the drivers. Thus, each transportation supervisor must also possess a commercial driver's license and a school bus driver certificate.

Federal regulations require any driver holding a commercial license to submit to random drug and alcohol tests (drug tests). (See, e.g., 49 C.F.R. § 382 et seq.) Section 382.211 of Title 49 of the Code of Federal Regulations provides, in pertinent part:

> No driver shall refuse to submit to a . . . random alcohol or controlled substances test required under § 382.305 . . . . No employer shall permit a driver who refuses to submit to such tests to perform or continue to perform safety-sensitive functions.

The federal regulations do not require an employer to terminate an employee who refuses to submit to a random drug test, but they also do not prohibit an employer from terminating an employee who refuses to test. (See, e.g., 49 C.F.R. §§ 285-289 [if driver violates regulations, employer can nevertheless return employee to safety-sensitive duties, provided employee shows signs of rehabilitation].)

Adoption of Drug Testing Procedure

On March 14, 1996, the District's Governing Board adopted a policy and approved a regulation establishing a drug testing procedure. District Administrative Regulation 4112.41, "Drug and Alcohol Testing For School Bus Drivers" (the Regulation) is "intended to bring the [D]istrict into compliance" with the federal regulations. Although the Regulation does not specifically mention supervisors, it defines "driver" broadly enough to include the transportation supervisors. The drug testing policy and the cognate Regulation both recite that they were adopted/approved on March 14, 1996, and were effective retroactive to January 1, 1996.

Like the federal regulations, the Regulation requires random drug testing and states that a driver who refuses a random drug test "shall be removed from performing safety-sensitive functions." Unlike the federal regulations, the Regulation provides that a driver who refuses a random drug test "will be disciplined in accordance with the [D]istrict's policy of 'Zero Tolerance'" (Zero Tolerance Policy). The Regulation defines zero tolerance as follows:

> Drivers covered by this policy will be dismissed if they violate [the drug testing policy]. This zero tolerance policy will apply to those drivers who refuse to submit to an alcohol or controlled substance test. Drivers who are dismissed from employment under board policy and administrative regulation of zero tolerance shall not be entitled to any special considerations for any future employment with the Fairfield-Suisun Unified School District for any position.

Under the zero tolerance policy, drivers refusing to be tested "will be dismissed." There are no exceptions.

MOS does not object to the provision in the Regulation that requires the transportation supervisors to submit to random drug tests, because that provision simply "mirror[s]" federal law. Rather, MOS objects to the Regulation's "zero tolerance" provision because federal law

does not require it. Thus, contends MOS, the District must negotiate with MOS before the District can apply the zero tolerance provision to employees in the MOS bargaining unit.

Notice to MOS

Rick Lemke (Lemke) is a supervisor employee and since 1989 has served as the MOS job steward. Lemke has acted as MOS chief negotiator for all MOS-District collective bargaining agreements since 1989. Lemke typically receives District governing board meeting agendas at his home, having requested that the District mail them to him.

In March 1996, Lemke received the agenda for the March 14, 1996 meeting of the District's governing board, to which was attached a copy of District Policy 4112.41 proposed for adoption by the governing board at the March 14, 1996 meeting. It was not established that the cognate Regulation was attached to the agenda sent to Lemke. Lemke was unaware of the zero tolerance policy contained in the Regulation until he learned of the District's suspension and termination of MOS member Keith A. Campbell (Campbell) in reliance on the zero tolerance policy.

Paul Dillon (Dillon), a transportation supervisor employee represented by MOS, served on the MOS negotiating team as note-taker starting in or around 2002. Dillon had routinely undergone drug testing in accordance with the District's drug testing policy. It was not established that Dillon was aware that the District's drug testing policy applicable to MOS bargaining unit members included a "zero tolerance" provision.

Campbell Termination[3]

The District's bus drivers are supervised by two transportation supervisors represented by MOS. The District hired Campbell as a school bus driver in or about 2001. The District promoted Campbell to transportation supervisor in 2003. Following his promotion, Campbell was represented by MOS.

On April 10, 2009, the District sent Campbell for a random drug test. Campbell traveled to the testing facility where he provided two samples for testing. Campbell was observed directly by testing facility personnel while giving the second sample. After providing the second sample under direct observation, testing facility personnel gave Campbell several instructions which he followed. When instructed to disrobe below the waist to permit inspection for a prosthetic device, Campbell refused. The testing facility reported to the District that Campbell had refused to participate. It was not alleged that Campbell had tested positive for a controlled substance or alcohol.

Thereafter, the District moved immediately against Campbell. On April 13, 2009, the District "suspended" Campbell. On May 15, 2009, the District served Campbell with written notice it was considering termination.[4] On May 27, 2009, the District served Campbell with

[3] The parties offered into evidence a written stipulation of certain facts regarding the assignment and termination of Campbell. The stipulation did not foreclose either party from adducing further evidence on the subject matter of the stipulation. We have considered the stipulated facts.

[4] The notice to Campbell of possible termination recited, inter alia, that:

> [T]he technician who observed the second sample asked you to raise your shirt above your waist and lower your clothing and underpants, to determine whether you had a prosthetic device. You refused to do this. The technician therefore properly concluded that you 'refused to participate' in the test . . . The District has adopted a 'zero tolerance' policy. Board policy

written termination charges (charges). The charges identified the cause for Campbell's termination as refusal "to submit to a ... random ... controlled substance and/or alcohol test" pursuant to the Regulation.

The Campbell termination was appealed to "advisory" arbitration. The arbitrator's recommendation is not part of the record. The District terminated Campbell on March 25, 2010. California's DMV revoked Campbell's school bus driver's certificate effective December 30, 2009 for a period of "[n]ot less than three (3) years".

District's Basis for Terminating Campbell

During the hearing in this matter, MOS sought to elicit testimony from Campbell about his testing experience. When the District's counsel objected, a colloquy ensued. The MOS advocate argued that such testimony was relevant to establish that Campbell was terminated because he refused to drop his pants when so directed by a technician at the off-site testing facility, not because he tested positive for use of a controlled substance or alcohol, and that therefore Campbell's conduct did not implicate the safety exception in Article 11. The District counsel responded that the District terminated Campbell under the zero tolerance policy, which permitted the District to act without using progressive discipline, and that in any event the safety exception in Article 11 was implicated by Campbell's conduct at the testing facility.

Later in the hearing, District Assistant Superintendent for Human Resources Ron Hawkins (Hawkins) testified that he approved the written dismissal charges delivered to Campbell. Hawkins characterized Campbell's termination as "[b]ased on Article 11 dealing with safety."

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and administrative regulations (AR 4112.41) provide: 'A driver will be dismissed from his/her position if he/she refuses to submit to a ... random ... controlled substance and/or alcohol test.'

Based on the charging documents in the record issued to Campbell in May 2009 by the District, we find that the District terminated Campbell for the reason specified therein, to wit, violation of the zero tolerance policy in the Regulation. The documents allege Campbell's refusal to comply with an instruction from the testing facility technician giving rise to a "refuse to test" report, which the District also characterized as failure to model appropriate behavior.

CONCLUSIONS OF LAW

We consider here an allegation of unilateral change. MOS contends that without providing MOS notice or an opportunity to bargain, the District adopted a drug testing regime containing a zero tolerance policy inconsistent with the negotiated progressive discipline procedure. Thereafter, asserts MOS, the District implemented the zero tolerance policy by terminating Campbell without implementing the agreed-upon progressive discipline procedure.

To prove up a unilateral change, the charging party must establish that: (1) the employer took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; (4) the action had a generalized effect or continuing impact on terms and conditions of employment. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160; *Grant Joint Union High School District* (1982) PERB Decision No. 196 *(Grant)*.) We look at each of these requirements.

Change in Policy

We look first at whether the District's actions of March 14, 1996 and May 15, 2009, changed its policy on employee discipline. It is undisputed that: (1) the District's progressive discipline policy located in Article 11 of its contract with MOS was in effect prior to January 1996, and has been in effect at all times since; (2) on March 14, 1996, the District governing

board adopted a drug testing policy impacting some employees (transportation supervisors) in the MOS bargaining unit; (3) the drug testing policy adopted in March 1996 contained a zero tolerance provision not mandated by state or federal law; and (4) the District first implemented the zero tolerance provision as to MOS unit employees when it noticed Campbell for termination on May 15, 2009.

MOS contends that the zero tolerance provision conflicted with and unilaterally changed the status quo progressive discipline provision in Article 11 of its contract with the District, which generally provides for progressive discipline. The District counters that the safety exception within the progressive discipline provision in Article 11 permits the District to utilize the zero tolerance provisions of the drug testing policy, and therefore it effected no unilateral change. (See Findings of Fact, at page 8, above.) We turn to Article 11.

Article 11 sets forth a general rule mandating progressive discipline with two exceptions. The general rule provides:

> Progressive steps shall be utilized in handling discipline and the discipline shall be commensurate with the offense. The following actions will be taken in order:
>
> > Verbal reprimand
> > Written reprimand
> > Discipline less than dismissal
> > Dismissal

The exceptions are:

> If the conduct of [the unit member] endangers the safety of students, employees, or District property, the Superintendent or his/her designee will not be required to follow the progressive steps of discipline and may suspend the supervisor with pay pending the outcome of the process prescribed herein.
>
> The Superintendent or his designee for reasons stated in writing and sent to [MOS] may skip one or more steps in the above sequence in cases of emergency. [Emphasis added.]

The District contends that the reference to "safety" in the first exception permits it to disregard progressive discipline when implementing the zero tolerance provision. MOS counters that the District reads the "safety" exception too broadly. We are called on to construe the extent of this "safety" exception in Article 11.[5]

We are guided by the normal aids to interpretation. (*Grossmont Union High School District* (1983) PERB Decision No. 313, pp. 16-17.) We consider first the plain meaning of the "safety" exception language. (See *Glendora Unified School District* (1991) PERB Decision No. 876, p. 9.) We look at the three principal terms, "conduct," "endanger" and "safety." We understand "conduct" to mean "behavior" of the unit member. (*Webster's Third New International Dictionary* (1976): "behavior in a particular situation or relation or on a specified occasion.") We understand "endanger" to mean "imperil." (*Id.*, "to bring into danger or peril of probable harm or loss: imperil or threaten danger to.") We understand "safety" to mean "being safe." (*Id.*, "the condition of being safe: freedom from exposure to danger: exemption from hurt, injury or loss.") Read together, we understand this "safety" exception to excuse compliance with progressive discipline steps where the unit member's "behavior threatens or exposes to danger" students, employees or District property.

We next consider the context of the "safety" language. It is couched as an exception to a broad general principle assuring employees progressive discipline. In such cases arbitrators construing collective agreements hold that an exception should "be strictly though, to be sure,

[5] PERB may not enforce collective agreements (EERA § 3541.5(b)), but construes them when necessary. (*Victor Valley Joint Union High School District* (1981) PERB Decision No. 192.)

properly construed and applied."[6] We note that statutory exceptions to grants of rights are likewise narrowly construed.[7] We thus read the "safety" provision in light of its context, as an exception to the general rule of progressive discipline.[8]

We conclude that the conduct for which Campbell was disciplined, refusing to comply with a directive from a testing technician, falls outside both exceptions. It did not threaten or expose to danger students, employees or District property constituting merely a refusal to follow an instruction given at a drug testing facility away from students, employees or property of the District. Nor did it constitute an emergency.

We conclude that the District's zero tolerance policy as adopted in March 1996, and as enforced by notice of termination issued on May 15, 2009 exceeds the scope of the exceptions in Article 11, and therefore effected a change in the parties' negotiated progressive discipline policy.

Scope of Representation

Employee discipline, including both the criteria for discipline and the procedure to be followed, are matters with the scope of representation under EERA. (*Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375 (*Healdsburg*); *San Bernardino City Unified School District* (1998)

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[6] *Unitog Company, Inc.*, 85 LA 740, 742 (Heinsz, 1985); Elkouri & Elkouri, *How Arbitration Works*, 498 (5th ed. 1997).

[7] *Los Rios Community College District* (1977) EERB Decision No. 18 (Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.); *City of National City v. Fritz* (1949) 33 Cal.2d 635.

[8] We note that the parties also crafted a second exception for matters of "emergency." We construe the "safety" exception in tandem with its "emergency" sibling, and conclude that the "safety" exception is further limited to circumstances other than an emergency.

PERB Decision No. 1270; *San Bernardino City School District* (1982) PERB Decision No. 255 (*San Bernardino*).)

Where, as here, external law mandates specified procedures in an area within the scope of representation, such procedures remain negotiable to the extent of the employer's discretion, that is, to the extent that the external law does not "set an inflexible standard or insure immutable provisions." (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 864-865.) Thus, where the external law is silent or otherwise fails clearly to "set an inflexible standard or insure immutable provisions," the parties may negotiate. (*Ibid.*) Contrarily, where external law sets an immutable standard, the parties may negotiate over including such a provision without a change in substance in their negotiated agreement. (*Id.* at p. 864.)

As noted above, the external federal law mandating a drug testing regime does not require the District to establish a zero tolerance discipline policy for violations thereof. Accordingly, such a zero tolerance discipline policy is discretionary with the District (*Id.* at pp. 864-865), and negotiable because it relates to employee discipline. (*Healdsburg; San Bernardino.*)

Notice and the Opportunity to Bargain

We look next at whether the District afforded MOS notice and an opportunity to negotiate over the adoption of the zero tolerance policy. PERB has long held that an employer's duty to bargain arises upon an exclusive representative's demand to bargain. (*Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223.) Notice of a proposed change must be given to an official of the employee organization having the authority to act on behalf of the organization. (*Fresno County Office of Education* (2004)

PERB Decision No. 1674.) The notice must be communicated in a manner that clearly informs the recipient of the proposed change. (*Lost Hills Union Elementary School District* (2004) PERB Decision No. 1652.) General publication of a governing board's agenda does not constitute effective notice to an exclusive representative of proposed changes in scope matters. (*Arvin Union School District* (1983) PERB Decision No. 300.) In any event, an exclusive representative need not make a demand to bargain where such demand is futile due to a change having already been made. (*San Francisco Community College District* (1979) PERB Decision No. 105; *Arcohe Union School District* (1983) PERB Decision No. 360.)

In March 1996, shortly before the March 14, 1996 District governing board meeting, Lemke, the MOS steward and chief negotiator, received at his home a copy of the District governing board's meeting agenda. A document accompanying the agenda described a drug testing policy. It was not established that the agenda was accompanied as well by a copy of the Regulation containing the drug testing regime and the zero tolerance policy. The document which accompanied the agenda stated that the drug testing policy was effective retroactively on January 1, 1996. We conclude that the document accompanying the agenda did not inform Lemke or MOS of the zero tolerance policy, and that even had it done so, the policy's retroactive effect on January 1, 1996 would have rendered negotiations futile.

Following adoption of the policy and the Regulation in March 1996, transportation supervisor employees represented by MOS were subjected to random drug tests thereunder. It was not established that any of these employees was informed of the zero tolerance provision in the Regulation, or that if so informed, they in turn informed MOS. Lemke was not a transportation supervisor. He testified that he first learned of the zero tolerance provision in May 2009 when the District initiated termination proceedings against Campbell. Dillon, a

transportation supervisor, did not testify. Testimony of Lemke established that as a transportation supervisor Dillon was required to undergo random drug testing. Dillon served as a member of the MOS negotiating team, in the role of note taker. It was not established that Dillon knew of the zero tolerance provision in the Regulation, or that Dillon informed MOS of such provision.

We conclude that MOS did not receive notice of the District's adoption or implementation of the zero tolerance provision of the Regulation until May 15, 2009, when Campbell was noticed for termination in reliance on the provision.

Generalized Effect or Continuing Impact

For a violation of a negotiated agreement also to constitute a change in policy, it must have a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members, and not constitute merely an isolated breach. (*Grant.*) A breach of contract results in a unilateral change where the party in breach asserts that the contract authorizes its conduct *Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186 or where there is a change in policy that is generally applicable to future situations. (*State of California (Department of Youth Authority)* (2000) PERB Decision No. 1374-S.)

Here it is undisputed that the zero tolerance provision of the drug testing policy adopted in March 1996 and first applied to a MOS unit member in May 2009 had a generalized effect and continuing impact.

In sum, we conclude that the District made and implemented a change in policy without affording MOS notice or an opportunity to meet and negotiate thereon. We turn now to the defenses raised by the District.

District Defenses: Statute of Limitations, Waiver/Laches

EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) A charging party must file a charge within six months of when it has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy. (*The Regents of the University of California* (1990) PERB Decision No. 826.)

We have found that MOS first learned on May 15, 2009 of the District's application of the zero tolerance provision to MOS unit members. Here MOS filed its charge on October 12, 2009, within six months of the District's termination notice to Campbell on May 15, 2009. We conclude, therefore, that MOS timely filed its unfair practice charge.

The District failed to establish that MOS waived by contract the right to negotiate over the District's decision to establish a zero tolerance policy. Waivers of the right to bargain are disfavored and must therefore be shown by "clear and unmistakable" language. An exclusive representative's waiver of the right to negotiate must be clear and unmistakable. (*Amador Valley Joint Union High School District* (1978) PERB Decision No. 74, p. 8; *San Mateo County Community College District* (1979) PERB Decision No. 94.) For a waiver by contract to be effective the matter must have been "fully discussed," and the union must have "consciously yielded" to it. (*Compton Community College District* (1989) PERB Decision No. 720, p. 19.) We conclude that the safety exception language of Article 11 fails to effectuate a waiver of the right to negotiate over the zero tolerance provision in the Regulation.

Nor did the District establish that MOS waived by "inaction" of the right to negotiate over the District's decision to adopt a zero tolerance policy. Crucial to an employer's prima facie defense of waiver by inaction is proof, by a preponderance of the evidence, that the employer asserting the defense gave the union notice and an opportunity to bargain, and that the union failed to act. (*Los Angeles Community College District* (1982) PERB Decision No. 252; *Beverly Hills Unified School District* (1990) PERB Decision No. 789.) Such proof was not adduced here. Moreover, where, as here, the District adopted retroactively its zero tolerance provision, a request to bargain would have been futile. In such circumstances a request to bargain is unnecessary. (*San Francisco Community College District* (1979) PERB Decision No. 105.)

Nor would the doctrine of laches compel dismissal of the charge.[9] Laches is an equitable defense based on charging party having: (1) unreasonably delayed asserting its claim and (2) either acquiescing in the act about which it now complains or permitting the respondent to have relied to its detriment on the charging party's silence. (See *Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 188.) The District failed to prove up either of the prerequisites for laches. The District failed to establish that prior to May 15, 2009 it provided MOS notice of the zero tolerance policy. Without notice MOS could neither acquiesce in adoption of the zero tolerance policy nor unreasonably fail to demand negotiations thereon. Likewise, the District failed to establish any detrimental reliance arising from MOS's failure to demand bargaining over the zero tolerance policy.

[9] We find a laches claim implicit in the District's contentions regarding inaction, so we address it.

CONCLUSION

We conclude that the District unilaterally changed its contractual employee discipline policy by establishing and enforcing a zero tolerance policy with respect to an employee's alleged refusal to submit to a random controlled substance and/or alcohol test, without meeting and negotiating with MOS over the decision to change its contractual policy, thereby violating EERA section 3543.5(a), (b) and (c).

REMEDY

We have concluded that the District unilaterally changed its employee discipline policy by establishing and enforcing a zero tolerance provision with respect to an employee's alleged refusal to submit to a random controlled substance and/or alcohol test, without meeting and negotiating with MOS over the decision to change the policy. By this conduct the District refused to bargain in good faith in violation of EERA section 3543.5(c). This conduct also interfered with the rights of bargaining unit employees to be represented by MOS in violation of EERA section 3543.5(a). And this conduct denied MOS its right to represent bargaining unit employees in violation of EERA section 3543.5(b).

We will order the District to cease and desist from enforcing as to MOS unit employees a zero tolerance provision with respect to an employee's alleged refusal to submit to a random controlled substance and/or alcohol test.

In addition, the appropriate remedy when an employer has committed an unlawful unilateral change is to direct the employer to restore the status quo by rescinding the change and making affected employees whole for any losses suffered as a result of this change. We conclude that the District terminated MOS unit employee Campbell in reliance on the zero tolerance provision and in violation of progressive discipline procedures in Article 11 of its

contract with MOS. Accordingly, we will order the District rescind the change, and, within thirty (30) days of the effective date of this order, to: (1) offer Campbell immediate unconditional reinstatement to a position of equivalent rank and stature as that held by Campbell prior to his termination; and (2) reimburse Campbell for all loss of salary and benefits caused by the termination, plus interest at the rate of seven (7) percent per annum, from the date of his termination on March 25, 2010, until the date the offer of reinstatement is made to him.

Finally, it is the customary remedy that the party found to have committed an unfair practice be ordered to post a notice incorporating the terms of the order. Such an order is granted to provide employees with a notice, signed by an authorized agent that the offending party has acted unlawfully, is being required to cease and desist from its unlawful activity, and will comply with the order. Thus, we will order the District to post a notice incorporating the terms of the order herein at its buildings, offices and other facilities where notices to bargaining unit employees are customarily posted. Posting of such notice effectuates the policies of the EERA that employees be informed of the resolution of this matter and the District's readiness to comply with the ordered remedy. (*Placerville Union School District* (1978) PERB Decision No. 69.)

ORDER

Based on the foregoing finding of facts and conclusions of law, and the entire record in this case, we conclude that the Fairfield-Suisun Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c), by establishing and enforcing a zero tolerance policy with respect to an employee's alleged refusal to submit to a random controlled substance and/or alcohol test, without meeting and

negotiating with the Mutual Organization of Supervisors (MOS) over the decision to establish this policy.

Pursuant to EERA section 3541.5(c) of the Government Code, it is hereby ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Establishing and enforcing a zero tolerance policy with respect to any MOS unit employee's alleged refusal to submit to a random controlled substance and/or alcohol test without meeting and negotiating with MOS.

2. Interfering with the rights of employees to be represented by MOS by the conduct described above.

3. Denying MOS its right to represent its unit members guaranteed by EERA.

B. TAKE THE FOLLOWOING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF EERA:

1. Rescind as to MOS unit employees the zero tolerance policy with respect to an employee's alleged refusal to submit to a random controlled substance and/or alcohol test.

2. Within fifteen (15) days of the service of a final decision in this matter: (a) offer Keith A. Campbell (Campbell) reinstatement to a position of equivalent rank and stature as that held by Campbell upon his termination; and (b) reimburse Campbell for all loss of salary and benefits caused by the termination, plus interest at the rate of seven (7) percent per annum, from the date of his termination on March 25, 2010, until the date the offer of reinstatement is made to him.

3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to classified supervisory employees are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on MOS.

Chair Martinez joined in this Decision.

Member Dowdin Calvillo concurrence begins on page 22.

DOWDIN CALVILLO, Member: I concur with the result reached by the majority in this case. I find it unnecessary, however, to determine whether Keith A. Campbell's (Campbell) conduct fell within the "safety" exception to Article 11 of the memorandum of understanding. Based upon the record before us, and as found by the majority, it is clear that the Fairfield-Suisun Unified School District (District) did not rely on Article 11 in terminating Campbell but instead based its decision on its determination that Campbell violated the zero tolerance policy. Only after the charge was filed in this case did it claim that it acted pursuant to the safety exception of Article 11. Therefore, I do not join in the majority's determination that the conduct for which Campbell was disciplined falls outside the scope of the exceptions to the progressive discipline policy set forth in Article 11. Rather, I conclude that the District unlawfully unilaterally changed its policy on employee discipline when it terminated Campbell based upon the zero tolerance policy without first satisfying its obligation to provide the Mutual Organization of Supervisors with notice and an opportunity to bargain over that policy.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-2806-E, *Mutual Organization of Supervisors v. Fairfield-Suisun Unified School District*, in which all parties had the right to participate, it has been found that the Fairfield-Suisun Unified School District violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c), by establishing and enforcing a zero tolerance policy with respect to an employee's alleged refusal to submit to a random controlled substance and/or alcohol test, without meeting and negotiating with the Mutual Organization of Supervisors (MOS) over the decision to establish this policy.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Establishing and enforcing a zero tolerance policy with respect to any MOS unit employee's alleged refusal to submit to a random controlled substance and/or alcohol test without meeting and negotiating with MOS.

2. Interfering with the rights of employees to be represented by MOS by the conduct described above.

3. Denying MOS its right to represent its unit members guaranteed by EERA.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF EERA:

1. Rescind as to MOS unit employees the zero tolerance policy with respect to an employee's alleged refusal to submit to a random controlled substance and/or alcohol test.

2. Within fifteen (15) days of the service of a final decision in this matter: (a) offer Keith A. Campbell (Campbell) reinstatement to a position of equivalent rank and stature as that held by Campbell upon his termination; and (b) reimburse Campbell

for all loss of salary and benefits caused by the termination, plus interest at the rate of seven (7) percent per annum, from the date of his termination on March 25, 2010, until the date the offer of reinstatement is made to him.

Dated: _____

FAIRFIELD-SUISUN UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.